

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**STEPHANIE KUYKENDALL,
HAILEY LYTLE, ROWAN
McCOY, ZOE WALKER,
JASMINE DURDEN, and
JACHURA LAWTON,**

Petitioners,

v.

1:17-cv-462-WSD

**TROP, INC. d/b/a PINK PONY,
PONY TAIL, INC. d/b/a CLUB
ONYX, TERI L. GALARDI,
Individually and in her capacities of
President and Owner of Trop, Inc.
and President and CEO of Pony Tail,
Inc., MIKE KAP, Individually,
RICK HAYES, Individually, and
JEFF JONES, Individually,**

Respondents.

OPINION AND ORDER

This matter is before the Court on Respondents’ Mike Kap, Rick Hayes, Jeff Jones, Trop, Inc. and Pony Tail, Inc. (collectively, the “Respondents”) Motion to Dismiss for Insufficiency of Process [12] (“Motion to Dismiss”) and Respondent Teri Galardi’s Motion to Quash Service of Summons [13] (“Motion to Quash”). Also before the Court is Petitioners’ Stephanie Kuykendall, Hailey Lytle, Rowan

McCoy, Zoe Walker, Jasmine Durden, and Jachura Lawton (“Petitioners”) Motion to Strike Respondent Galardi’s Motion to Quash Service [14] (“Motion to Strike”) and Out-of-Time Motion for Leave to File Memorandum of Law in Opposition to Respondents’ Motion to Dismiss [22] (“Motion for Leave to File Out-of-Time Response”).

I. BACKGROUND

On February 7, 2017, Petitioners filed their Complaint to Compel Arbitration and for Specific Performance [1] alleging violations of 9 U.S.C. § 4 for Respondents’ alleged failure and refusal to arbitrate claims arising under the Fair Labor Standard Act (“FLSA”) in accordance with the terms of the parties’ arbitration agreement. ([1] ¶¶ 23-24). Petitioners argue that Respondents misclassified them as “independent contractors,” when they should have been treated as “employees”—thereby failing to pay them the minimum wages specified by the FLSA. ([1] at 7). Petitioners also seek an order “requiring specific performance of Respondents’ obligations under the arbitration agreement, including but not limited to paying all AAA administrative fees and arbitrator compensation.” ([1] ¶¶ 25-28).

On May 12, 2017, Respondents Mike Kap, Rick Hayes, Jeff Jones, Trop, Inc. and Pony Tail, Inc. filed their Motion to Dismiss pursuant to Rule 4(m) of the

Federal Rules of Civil Procedure arguing that Petitioners failed to perfect service of process within 90 days of filing the Complaint. On May 15, 2017, Respondent Teri Galardi filed her Motion to Quash Service of Summons claiming that it was improper to try to serve her during a deposition in which she was participating. She claims the case in which the deposition was taken was a matter unrelated to this action. On May 18, 2017, Petitioners filed their Motion to Strike,¹ and on May 30, 2017, Petitioners filed their Motion for Leave to File Out-of-Time Response.

II. DISCUSSION

A. Respondents' Motion to Dismiss for Insufficient Service of Process

1. Legal Standard²

“A plaintiff is responsible for serving the defendant with both a summons

¹ Petitioners concede that their Motion to Strike is improper because “motions to strike” are applicable only to pleadings, and not motions. (Response in Opposition to Respondent Galardi’s Motion to Quash Service [18] at 8); see Fed. R. Civ. P. 12(f) and Rule 7(a). Petitioners thus ask the Court to “simply deny” Respondent Teri Galardi’s Motion to Quash instead of striking it. ([18] at 8). The Court denies Petitioners’ Motion to Strike as moot.

² Because this is an arbitration matter, the Court looks to 9 U.S.C. § 4 for guidance regarding the applicability of the Federal Rules of Civil Procedure. It dictates that the petitioner must provide “[f]ive days’ notice in writing of such application [to] be served upon the party in default.” See 9 U.S.C. § 4. “Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.” Id.

and the complaint within the time permitted under Rule 4(m).” Anderson v. Osh

Kosh B’Gosh, 255 F. App’x. 345, 347 (11th Cir. 2006). Rule 4(m) provides:

Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m); see Lepone-Dempsey v. Carroll Cnty. Comm’rs, 476 F.3d 1277, 1281 (11th Cir. 2007).

Under Rule 4(e), service of process may be effected on an individual in one of four ways: first, by serving the defendant with process in accordance with Georgia law; second, by delivering to the defendant personally a copy of the summons and complaint; third, by leaving a copy of each at the defendant’s “dwelling or usual place of abode,” under certain proscribed conditions; or finally, by leaving a copy of each with an “agent authorized by appointment or by law to receive service of process.” Fed. R. Civ. P. 4(e). Georgia law regarding personal service of process mirrors the federal rules:

Service shall be made by delivering a copy of the summons attached to a copy of the complaint . . . to the defendant personally, or by leaving copies thereof at the defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or law to receive service of process.

O.C.G.A. § 9-11-4(e)(7). Under Georgia law, “[m]ailing a copy of [a] petition or complaint does not [ordinarily] constitute service of process.” Camp v. Coweta Cnty., 625 S.E.2d 759, 761, n.2 (Ga. 2006).

Rule 4(h) requires plaintiffs to serve a corporate defendant in one of two ways. First, the defendant may be served “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.” Fed. R. Civ. P. 4(h)(1)(B); see Dyer v. Wal-Mart Stores, Inc., 318 F. App’x 843, 844 (11th Cir. 2009). Second, “a plaintiff may use any method of service allowed in the state where the district court is located or where service is made.” Dyer, 318 F. App’x at 844. “Under Georgia’s Civil Practice Act, service of process must be made on a corporation by personally serving ‘the president or other officer of such corporation or foreign corporation, managing agent thereof, or a registered agent thereof.’” Hunt v. Nationstar Mortg., LLC, 684 F. App’x 938, 940-41 (11th Cir. 2017) (quoting O.C.G.A. § 9-11-4(e)(1)(A)); see Clarke v. LNV Corp., No. 3:14-CV-139-TCB-RGV, 2015 WL 11439083, at *4 (N.D. Ga. Apr. 6, 2015). “However, if service on the listed agents cannot be had, the Georgia secretary of state is deemed an agent of the corporation for purposes of service of process.” Hunt, 684 F. App’x at 941. “To perfect service on the secretary of state, the

plaintiff must deliver a copy of the process to the secretary of state or other agent designed by the secretary of state along with a copy of the affidavit to be submitted to the court pursuant to the Civil Practice Act.” Id.

“Service of process that is not in ‘substantial compliance’ with the requirements of the Federal Rules is ineffective to confer personal jurisdiction over the defendant, even when a defendant has actual notice of the filing of the suit.”

Abele v. City of Brooksville, Fla., 273 F. App’x. 809, 811 (11th Cir.

2008); see Pardazi v. Cullman Med. Ctr., 896 F.2d 1313, 1317 (11th Cir. 1990)

(“Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when that defendant has not been served.”). “Good

cause” for insufficient service exists “only when some outside factor, such as reliance on faulty advice, rather than inadvertence or negligence, prevented

service.” Lepone-Dempsey, 476 F.3d. at 1281. “Even in the absence of good

cause, a district court has the discretion to extend the time for service of process.”

Id. “Relief may be justified, for example, if the applicable statute of limitations would bar the re-filed action, or if the defendant is evading service or conceals a defect in attempted service.” Id. at 1282.

2. Analysis

First, the record is entirely devoid of any evidence establishing that service of process was perfected on the Individual Respondents. Petitioners in fact concede that they do not oppose the Motion to Dismiss as to Respondents Kap, Hayes, and Jones.³ (Motion for Leave to File Out-of-Time Response at n.1). The Court thus grants the Motion to Dismiss as to the Individual Respondents.

Second, Petitioners allege that, after attempting three times to personally serve the Corporate Respondents' registered agent, Dennis Williams, at the address specified in the records of the Secretary of State, on March 29, 2017, they sent by certified U.S. mail copies of the summons and complaint. ([22.1] at 2). Petitioners argue that they perfected service pursuant to the second means by which they were permitted to serve a corporate defendant—using any method of service allowed in

³ A response to Respondents' Motion to Dismiss was due no later than May 26, 2017. See LR 7.1(B), N.D.Ga. On May 30, 2017, Petitioners moved for leave from the Court to file an untimely response to the Motion to Dismiss. "A district court must be able to exercise its managerial power to maintain control over its docket," and, absent good cause for an extension, the Court's deadlines must be enforced. Young v. City of Palm Bay, Fla., 358 F.3d 859, 864 (11th Cir. 2004). Although the Court notes that Petitioners do not provide a particularly good explanation regarding their delay, the Court finds that a delay of merely one day is excusable and does not prejudice Respondents. The Court grants the Motion for Leave to File Out-of-Time Response.

the state where the district is located. Petitioners contend that Georgia law authorizes an alternative means of service in those situations where a corporation's registered agent cannot with reasonable diligence be served. Petitioners specifically point to O.C.G.A. § 14-2-504(b), which provides:

If a corporation has no registered agent or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office.

Petitioners assert that they were entitled to serve process via certified or registered mail, pursuant to § 14-2-504(b), because they exercised "reasonable diligence" in attempting, on three separate occasions, to serve the Corporate Respondents' registered agent, including:

On March 13, 2017 at approximately 2:30[]pm service was attempted on the registered agent of Trop Inc and Pony Tail, Inc. on their registered agent for service Mr. Dennis Williams at 2555 Chantilly Drive, Atlanta, Georgia, 30324, by Process Server Tabitha Baker. As reflected in the Declaration of Service executed by process server Tabitha Baker, the individual at the front reception area informed her that Mr. Williams was not in. Ms. Baker asked if Mr. Williams was in the office regularly and the reply was he did not know because there were a bunch of different clubs and did not know when to expect him back in the office.

On March 27th at approximately 3:30 service was once again attempted on the registered agent of Trop, Inc. and Pony Tail, Inc., Mr. Dennis Williams, at 2555 Chantilly Drive, Atlanta, Georgia, 30324, by process server Tabitha Baker. On March 28th 2017 at approximately 1pm service was attempted on the registered agent of

Trop, Inc. and Pony Tail, Inc., Mr. Dennis Williams, at 2555 Chantilly Drive, Atlanta, Georgia, 30324, by Process Server Michael Campo. Mr. Campo was stopped by a security guard and denied entry to the location. Mr. Campo asked if Mr. Williams was in and the security guard stated he was not. The process server asked if Mr. Williams still keeps an office as the registered agent for Pink Pony and Onyx at the building and the security guard again replied he was not in. The process server asked when Mr. Williams would be back in and the security guard stated again that he was not in.

([23] ¶¶ 5-11).

The Court finds that these attempts do not exhibit “reasonable diligence.”

Although Petitioners admittedly exercised some degree of diligence in sending process servers to the Corporate Respondents’ registered agent’s address on three separate occasions, they fail to allege, or submit evidence, showing that they made any other attempts or investigation into the registered agent’s whereabouts.

Petitioners did not attempt to locate the registered agent at another location that he might reasonably have been expected to be at. For example, Petitioners could have attempted to locate the registered agent at Respondents’ night clubs as indicated by the receptionist on the first attempt. Petitioners also could have attempted service during other hours of the day, and not just during the afternoon. The Court therefore grants Respondents’ Motion to Dismiss as to the Corporate Respondents Trop, Inc. and Pony Tail, Inc.

B. Respondents' Motion to Quash

Individual Respondent Galardi moves to quash service of summons upon her in this matter. On March 29, 2017, during a deposition in the office of Respondents' counsel "in a separate, unrelated arbitration proceeding, Petitioners attempted to personally serve Respondent [] Galardi with a summons and copy of the [p]etition in this [p]roceeding." ([13] at 2). Galardi argues that "[s]ervice of the summons . . . should be quashed because a witness, while in attendance in deposition in one legal proceeding is immune from service of process in another." (Id.).

Galardi relies on Lamb v. Schmitt—a U.S. Supreme Court case from 1932—to support her argument that she is entitled to immunity from service of process. 285 U.S. 222, 224 (1932). In Lamb, the Supreme Court affirmed the district court's holding that a nonresident voluntarily appearing in another state for a judicial proceeding in a related suit was not immune from service of process. Id. at 228. The Court noted, however, that "the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending

litigation.” Id. at 227. The immunity conferred by the court is “extended or withheld only as judicial necessities require.” Id. at 225-26, Long v. Ansell, 293 U.S. 76 (1934).

Galardi contends that, as a nonresident of the Northern District of Georgia, she was entitled to immunity from service of process when she appeared for a deposition in “two unrelated legal proceedings: Lauren Roberts, et al. v. Trop, Inc. and Teri Galardi v. Latoya Becton, et al. v. Country Club, Inc. and Teri Galardi, both private arbitration proceedings pending before Arbitrator George Reid.” ([13] at 3). Galardi states that “[t]here is no relationship between this civil action and the private arbitration proceedings during which [p]etitioners attempted to serve [her].” (Id.). Galardi provides no additional information regarding the relatedness of the arbitration proceedings.

Petitioners argue, however, that the arbitration proceedings are “intimately related” to this action and involve “other, identically situated Pink Pony exotic dancers.” ([18] at 1). Petitioners state in their Response to the Motion to Quash that, “[a]s with the claims in this case, the Roberts and Bechton cases arise from Respondent Galardi’s Atlanta-based operation of various strip clubs in and around Atlanta, and Galardi’s decision to unlawfully characterize dancers/entertainers working at those establishments as ‘independent contractors.’” ([18] at 4). They

provide, as an exhibit to their Response to the Motion to Quash, the deposition transcript from the day Galardi was served. Upon careful review, the transcript indicates the arbitration proceedings involved FLSA claims by exotic dancers previously employed in Galardi's night clubs. The deposition testimony includes the following:

- Q: What acts, Mrs. Galardi, have you undertaken, after you inherited your interest in these adult entertainment clubs, to make sure they complied with FLSA as to entertainers?
- A: I don't deal with the entertainers.
- ...
- A: Are you asking me whether or not I think these girls are independent contractors, if they're entertainers—are you asking that? How I feel about that, is that what you're asking me, my opinion and how I feel about that?
- ...
- A: They're entertainers. They're independent contractors. Just like a comedian you would hire in a club or a singer you would hire in a club

([18.2] at 44:15-19, 80:25-81:4, 81:25-82:4). The Court concludes the arbitration proceedings, like in Lamb, are sufficiently related to this action such that service upon Galardi did not entitle her to immunity.⁴ The matters involve similar

⁴ As explained in Lamb and Ansell, the “immunity” from service exception is discretionary, and the Court finds that even if the actions were not related, Galardi would not be entitled to immunity from service of process. Lamb, 285 U.S. at 225-26; see also Ansell, 293 U.S. at 76.

allegations, similar facts, and at least two of the same parties.⁵ Respondent Galardi's Motion to Quash is therefore denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Petitioners' Stephanie Kuykendall, Hailey Lytle, Rowan McCoy, Zoe Walker, Jasmine Durden, and Jachura Lawton Motion to Strike Respondent Galardi's Motion to Quash Service [14] is **DENIED AS MOOT. IT IS FURTHER ORDERED** that Respondent Teri Galardi's Motion to Quash Service of Summons [13] is **DENIED**.

IT IS FURTHER ORDERED that Petitioners' Out-of-Time Motion for Leave to File Memorandum of Law in Opposition to Respondents' Motion to Dismiss [22] and Respondents' Mike Kap, Rick Hayes, Jeff Jones, Trop, Inc. and


⁵ "There is generally no immunity from service of process when the suit in which the immunity is sought is part of, or a continuation of, the suit for which the person claiming immunity is in the jurisdiction." See 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1080 (4th ed. 2017); see also ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995) (affirming denial of immunity where relatedness between civil action and arbitration proceedings "involv[ed] the same facts and most of the same allegations"); McDonnell v. American Leduc Petroleum, Ltd., 456 F.2d 1170 (2d Cir. 1972) (holding immunity not proper where "two proceedings involve vindication of the same cluster of rights and interests").

Pony Tail, Inc. Motion to Dismiss for Insufficiency of Process [12] are

GRANTED.

IT IS FURTHER ORDERED that this action is **DISMISSED WITHOUT PREJUDICE** as to Respondents Mike Kap, Rick Hayes, Jeff Jones, Trop, Inc. and Pony Tail, Inc.

SO ORDERED this 9th day of November, 2017.



WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE